84-391

Office Supreme Court US
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ALEXANDER L. STEVAS,
CLERK

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

I. HARRY LYON; MICHAEL D. BLALOCK,

Petitioners,

v.

ALABAMA STATE BAR,

Respondent.

ON APPEAL FROM THE
SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

I. Harry Lyon
Michael D. Blalock
Pro Se
2900 Linden Avenue
Birmingham, AL 35209
(205) 879-0000

August 9, 1984

QUESTION PRESENTED FOR REVIEW

Are Petitioner's First Amendment Freedom of Speech rights violated by being required to place in their legal advertisements the following disclaimer as promulgated under DR 2-102(A)(7)(f) of the Alabama Rules of Professional Responsibility, to-wit:

> "No representation is made about the quality of legal services to be performed or the expertise of the lawyer performing such services."

AFFIDAVIT

I, Joe R. Whatley, as a member of the Bar of this Court, do hereby swear that Michael D. Blalock did deposit in the United States Mail the Writ of Certiorari captioned I. Harry Lyon and Michael D. Blalock v. Alabama State Bar. Furthermore, that this mailing took place on August 8, 1984, which is within the permitted time for filing this appeal.

Joe R. Whatley

JOE R. WHATLEY

SWORN to and SUBSCRIBED before me this the 8 day of August, 1984.

Valda R Johnson

NOTARY PUBLIC

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QUESTION PRESENTED FOR REVIEW

Are Petitioner's First Amendment Freedom of Speech rights violated by being required to place in their legal advertisements the following disclaimer as promulgated under DR 2-102(A)(7)(f) of the Alabama Rules of Professional Responsibility, to-wit:

> "No representation is made about the quality of legal services to be performed or the expertise of the lawyer performing such services."

PARTIES TO THIS PROCEEDING

The caption of the case contains the names of all the parties to this proceeding.

OPINION BELOW

Reference is made to the opinion of Justice Sam Beatty of the Alabama Supreme Court, a copy of which is attached hereto. (See Appendix I)

JURISDICTION

Jurisdiction is invoked under the Freedom of Speech clause of the First Amendment of the United States Constitution as made applicable to the States under the Fourteenth Amendment to the United States Constitution.

The date of judgment sought to be reviewed is May 11, 1984. The same date also is the date of entry of this judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

i) The First Amendment to the Constitution of the United States, which provides:

> Congress shall make no law representing an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble, and to perform the Government for a redress of grievances.

ii) The Fourteenth Amendment to the Constitution of the United States, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

iii) Displinary Rule DR 2-102 (A)(7)(f) of the Code of Professional Responsibility of the Alabama State Bar as adopted May 6, 1974, and as amended thereafter. (See Appendix I, pages 3 and 4).

STATEMENT OF THE CASE

On February 19, 1981, the Petitioners placed an advertisement for their

legal services in a newspaper of general circulation in the County where they practiced law. The advertisement read as follows:

"LEGAL SERVICES

"PROVIDED BY

"HARRY LYON AND MIKE BLALOCK

"ATTORNEYS AT LAW

"SUITE 207-209 JOHNSON BUILDING
"HIGHWAY 31 SOUTH IN PELHAM

"UNCONTESTED DIVORCES $145.00
"W/Agreement $250.00

"PERSONAL BANKRUPTCY $350.00

"SIMPLE WILLS . . . . . $ 75.00
"Video Taped Will $250.00

"PHONE 987-7007 FOR APPOINTMENT

(ABOVE FEES DO NOT INCLUDE COURT COSTS)

On April 6, 1981, the General Counsel for the Alabama State Bar filed a complaint in the office of the Secretary of the Bar alleging that Petitioners had violated several displinary rules of the Code of Professional Responsibility.

Subsequently the Board of Bar Commissioners of the Alabama State Bar found Lyon and Blalock (Petitioners herein) guilty of all four charges brought against them and punished them with a private reprimand on each count. The Petitioners appealed their decision to the Alabama Supreme Court.

On May 11, 1984, the Alabama Supreme Court reversed the Displinary Board on three of the four charges and remanded the cases back to them for further consideration consistent with the Court's ruling. The lone charge that was affirmed is the matter before this Court.

The Petitioners raised the First Amendment Constitutional question in filing their answer to the Bar's original complaint. (See Appendix 2)

REASONS FOR GRANTING THE WRIT

Petitioners assert that Displinary Rule DR 2-102(A)(7)(f) is contrary to the

Supreme Court's ruling in Bates v. State Bar of Arizona, 433 U.S. 350 (1977) in that it places an unreasonable restriction on the manner in which they have chose to advertise because it requires a disclaimer to be included in every ad.

Second, the Petitioners assert per In Re R.M.J., 102 S.Ct. 929, 71 L.Ed. 2d 64 (1982), that the state cannot impose a restriction on an ad unless it is false, deceptive or misleading. It is Petitioners' position that the blanket disclaimer found in DR 2-102(A)(7)(f) makes no determination as to whether an ad is false, deceptive or misleading.

Finally, Petitioners aver that the interference with their right of free speech, as provided by the First Amendment and made applicable to the States by the Fourteenth Amendment, imposed by requiring disclaimer, far outweighs any substantial interest which the Bar would assert in order to regulate the advertisement as provided in this Court's ruling of In Re R.M.J., supra.

Specifically, it is Petitioners' opinion that this disclaimer is unnecessary in an advertisement which makes no representation whatsoever as to the quality of legal services to be performed or the expertise of the lawyer.

CONCLUSION

For all the reasons stated in this petition, your Petitioners pray that the Court will grant a Writ of Certiorari to the Alabama Supreme Court.

Respectfully submitted,

Michael D. Blalock
I. Harry Lyon

MICHAEL D. BLALOCK
I. HARRY LYON
Pro Se
2900 Linden Avenue
Birmingham, AL 35209
(205) 879-0000

August 9, 1984

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Writ of Certiorari upon the Honorable Hugh Morrow, General Counsel for the Alabama State Bar Association, by placing a copy of same in the United States Mail, first class postage prepaid this the 9th day of August, 1984.

Michael D. Blalock

MICHAEL D. BLALOCK

A P P E N D I X

I. Opinion of the Alabama Supreme Court in I. Harry Lyon and Michael D. Blalock v. Alabama State Bar.

II. Answer of Lyon and Blalock to Complaint of Alabama State Bar.

THE STATE OF ALABAMA - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1983-84

I. Harry Lyon and Michael D. Blalock

82-574 v.

Alabama State Bar

Appeal from Disciplinary Board
of the Alabama State Bar

BEATTY, JUSTICE.

Two attorneys, I. Harry Lyon and Michael D. Blalock, appealed from the order of the Alabama State Bar Disciplinary Board (Board) that they each receive a private reprimand for failure to comply with specific disciplinary rules regarding advertising. We affirm in part and reverse and remand in part.

On February 19, 1981, Lyon and Blalock published an advertisement in the Shelby County Reporter, a weekly newspaper of general circulation in the municipality and county in which the office of the attorneys was located.

On April 6, 1981, the general counsel of the Alabama State Bar (Bar), William H. Morrow, Jr., filed a complaint in the office of the secretary of the Bar alleging that Lyon and Blalock had violated several disciplinary rules of the Code of Professional Responsibility of the Bar by placing the February 19, 1981, advertisement. That advertisement read as follows:

"LEGAL SERVICES

"PROVIDED BY

"HARRY LYON AND MIKE BLALOCK

"ATTORNEYS AT LAW

"SUITE 207-209 JOHNSON BUILDING
"HIGHWAY 31 SOUTH IN PELHAM

"UNCONTESTED DIVORCES . . . $145.00
"W/Agreement $250.00

"PERSONAL BANKRUPTCY . . . $350.00

"SIMPLE WILLS . . . . . $ 75.00
"Video Taped Will $250.00

"PHONE 987-7007 FOR APPOINTMENT

"(ABOVE FEES DO NOT INCLUDED COURT COSTS)"

In Charge K, the Bar alleged that "[b]y advertising their services for a fee to prepare a 'Video Taped Will' the attorneys . . . participated in the use of a form of public communication which contained misleading or deceptive statements since the words 'Video Taped Will' have no clearly defined meaning to the members of the legal profession or to the public." Therefore, the Bar charged the attorneys with failure to comply with DR 2-101(A), which provides:

> "A lawyer shall not prepare, cause to be prepared, use, or participate in the use of any form of public communication that contains false, fraudulent, misleading, deceptive or professionally self-laudatory statements."

The Bar alleged in Charge II that "[b]y advertising for a specific fee the pre-

paration of a 'Video Taped Will' the attorneys included in the advertisement services other than 'routine legal services' as defined in DR 2-102(A)(7)(b)."

DR 2-102(a)(7)(b), prior to its amendment effective January 26, 1983, provided:

> "The advertisement may contain a description of routine legal services performed by the lawyer. 'Routine legal services' are limited to uncontested divorces, uncontested adoptions, simple personal bankruptcies, changes of name, and the like. If the advertisement states the fees charged for such services, it shall only state the maximum lawyer's fee to be charged therefor and a separate reasonably accurate estimate of the costs that will be incurred in addition to the lawyer's fees."

Accordingly, the Bar charged the attorneys with failure to comply with that disciplinary rule.

Charge III also dealt with an alleged violation of DR 2-102(A)(7)(b). The Bar alleged that "[t]he advertisement . . . did not contain a separate reasonably accurate estimate of the costs that [would] be incurred

in addition to the lawyer's fees."

Charge IV concerned an alleged violation of DR 2-102(A)(7)(e), but that charge was subsequently dismissed at the Board's hearing because Lyon and Blalock had in fact complied with that rule.

In Charge V, the Bar alleged that "[t]he attorneys [had] failed to include in the advertisement . . . the disclaimer required," and thus charged the attorneys with violating DR 2-102(A)(7)(f), which, until the January 26, 1983, amendment provided:

> "No advertisement shall be published unless it contains, in legible print, the following language:
>
> "No representation is made about the quality of legal services to be performed or the expertise of the lawyer performing such services."

No substantive change was made by the January 26, 1983, amendment insofar as this charge is concerned.

In their answer, Lyon and Blalock admitted placing the advertisement containing

a quoted price for a "Video Taped Will" on February 19, 1981. They denied the remaining allegations and raised the following affirmative defenses:

> "A. That DR 2-102(A)(7)(c) states 'No representation shall be made in any [...] advertisement about the quality of legal services to be performed or the expertise of any lawyer or firm of lawyers to perform such services.'
>
> "That respondents in their ad did not make any representation as to quality of services or expertise.
>
> "That respondents contend that having complied with DR 2-102(A)(7)(c), that (DR 2-102(A)(7)(f) does not apply.
>
> "B. That DR 2-102(A)(7)(f) (the disclaimer/exculpatory clause) is a clear and flagrant contradiction to DR 6-102 Limiting Liability to Client which states 'A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice' therefore to include the disclaimer/exculpatory clause as recited in DR 2-102(A)(7)(f) is to violate DR 6-102.
>
> "That Respondents contend that Petitioner's Complaint is without merit in that Respondents have complied with and rely on the landmark decision of the

United States Supreme Court in the case of Bates v. Arizona State Bar Association, 43 U.S. 350 (1977), and the First Amendment to the United States Constitution.

"That if Respondents are found to have violated any disciplinary rule related to advertising as set forth in Petitioner's Complaint, that said rule is unreasonable and therefore void ab initio (See Bates v. Arizona, 43 U.S. 350 (1977)."

The Board conducted a hearing in Jefferson County on February 18, 1983. At the hearing, the Bar called upon Lyon and Blalock as adverse witnesses under Rule 43(b), A.R.Civ.P. The bar offered into evidence a copy of the February 19, 1981, Shelby County Reporter containing the advertisement of Lyon and Blalock.

The Bar and members of the Board questioned Lyon and Blalock about the charges against them, and the two attorneys presented their defenses to the Board. After the hearing, the Board found Lyon and Blalock guilty of Charges I, II, III, and V, and fixed the discipline as a private reprimand. Lyon and

Blalock appealed to this Court pursuant to Rule 8(d) of the Rules of Disciplinary Enforcement.

The issues before this Court are whether sufficient evidence was presented to support the Board's finding that Lyon and Blalock were guilty of the charges brought against them under DR 2-101(A), DR 2-102(A)(7)(b), and DR 2-102(A)(7)(f), and whether those rules violated the constitutional guarantee of commercial free speech as applied to the appellant's advertisement.

The United States Supreme Court held for the first time in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), that First Amendment protection extended to "truthful" advertising of "routine" legal services by attorneys, and that, accordingly, attorney advertising could not be subjected to blanket suppression. The Court emphasized, however, that false, deceptive, or misleading advertising remained subject to restraint.

Subsequently, the Court discussed Bates and the standard by which the state regulation of attorney advertising would be judged in In The Matter Of R.M.J., 455 U.S. 191, 203 (1982):

> "Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proven that in fact such advertising is subject to abuse, the states may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the states may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive. Thus, the Court in Bates, suggested that the remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation. 433 U.S. at 375, 97 S.Ct. at 2704. Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception.

> "Even when a communication is not misleading, the state retains some authority to regulate. But the state must assert a substantial interest and the interference with speech must be in proportion to the interest served. Central Hudson Gas Co. v. Public Service Comm'n, 477 U.S. at 563-564, 100 S.Ct. at 2350. Restrictions must be narrowly drawn, and the state lawfully may regulate only to the extent regulation furthers the state's substantial interest. . . ." (Footnote omitted.)

I

In determining the issue of sufficiency of the evidence to support the Board's finding that Lyon and Blalock violated DR 2-101(A) (Charge I), we must decide initially who bears the burden of proving whether or not an advertisement is "misleading." This question is important in the present case because Lyon and Blalock assert that the Bar produced no evidence at the disciplinary hearing to show that the words "Video Taped Will" were misleading. The Bar responds that the attorneys had the initial burden "to show that their specific adver-

tisement [was] entitled to First Amendment protection," and quotes the following passage from Bates in support of its position:

> "In the First Amendment context, the Court has permitted attacks on overly broad statutes without requiring that the person making the attack demonstrate that in fact his specific conduct was protected. . . .
>
> ". . .Since overbreadth has been described by this Court as 'strong medicine, which has been employed . . . sparingly and only as a last resort, Broadrick v. Oklahoma, 413 U.S., at 613, 93 S.Ct., at 2916, we decline to apply it to professional advertising, a context where it is not necessary to further its intended objective. . . ." Bates, 433 U.S. at 380-381.

The bar contends that this quotation from Bates indicates that the Court intended for a person attacking a regulation on First Amendment grounds to first show that the speech sought to be regulated was protected. If that was the Court's intention, then, in the commercial speech context, since misleading advertising may be prohibited, In The Matter of R.M.J., 455 U.S. at 203, that person would have to prove that the speech was

not misleading. The Bar argues that the attorneys accused of violating DR 2-101(A) had to prove that the advertisement was not misleading, thus relieving the Bar from proving that it was misleading.

The Bates Court determined that the advertisement at issue in that case was not misleading and therefore was entitled to First Amendment protection. In making its determination, the Court responded to the Bar's arguments that the advertisement was misleading and stated: "We conclude that it has not been demonstrated that the advertisement at issue could be suppressed." 433 U.S. at 381. The Court did not state who failed to demonstrate that the advertising could be suppressed." but it seems logical to presume that it was the Bar, since the Court alluded to the Bar's arguments and because the attorneys would not be trying to demonstrate that their advertisement could be suppressed.

Similarly, in R.M.J., supra, the Court stated that the appellant's listing

of areas of practice had "not been shown to be misleading," without indicating by whom. Again, the inference is that it was the Bar which did not show that the advertisement was misleading.

Therefore, reading the Court's analysis in Bates and R.M.J. in light of the language from Bates quoted by the Bar, it is unclear whether the Supreme Court intended to place the burden of proof upon an attorney in a disciplinary proceeding brought by a state bar. In the absence of a clear mandate in that regard, we are hesitant to depart from the traditional rule. The Bar has the burden in a disciplinary proceeding to show by the evidence that the lawyer charged has violated the rules. E.g., Dodd v. Board of Commissioners of the Alabama State Bar, 365 So. 2d 975, 977 (Ala. 1978).

Therefore, with regard to Charge I, the burden was on the Bar to prove that Lyon and Blalock's conclusion of the words "Video Taped Will . . . . $250.00" caused the

advertisement to be misleading. In its brief, the Bar states:

> "The following questions propounded to the Respondents by members of the Disciplinary Board are significant, since it appears that to the members of the Disciplinary Board, all experienced attorneys, the word 'Video Taped Will' had no clearly defined meaning.
>
> "Mr. Sherrill: What is a video tape will, Mr. Lyon?
>
> "Mr. Chairman: Does a video tape will supplement a written will?
>
> "Mr. Robinson: All right. Your charge you list in there $250. Does that include everything including the cost of film and all that?

Then, in its argument that Lyon and Blalock violated DR 2-101(A) (Charge I), the Bar states:

> "As hereinabove illustrated, by quotations set forth in the Statement Of the Facts, the members of the Disciplinary Board, all experienced attorneys, did not understand the meaning of the words "Video Taped Will."
>
> ". . . .
>
> "The record reflects that the words 'Video Taped Will'

> have no clearly defined meaning to the members of the legal profession, and, a fortiori, would be virtually meaningless to a member of the unsophisticated public."

The Bar must prove the guilt of the attorneys charged by a preponderance of the evidence, Dodd v. Board of Commissioners of the Alabama State Bar, 350 So. 2d 700, 705 (Ala. 1977). The record reveals that the Bar introduced no evidence that the words "Video Taped Will" caused the advertisement to be misleading, but relied instead on the questions asked by the Board during the hearing as evidence. Therefore, the Bar failed to prove that Lyon and Blalock were guilty of Charge I, and, accordingly, the Board's finding that Lyon and Blalock were guilty of Charge I is due to be reversed.

II

In its argument that Lyon and Blalock violated DR2-102(A)(7)(b) (Charge II), which allows for attorney advertising of "routine legal services," the Bar concluded that the

advertisement of the video taped will was not the advertisement of a routine legal service. That conclusion was also based upon questions from the Board and the testimony of Lyon that he had learned about video tape wills only a year prior to the advertisement:

> "Since it is apparent that the members of the Disciplinary Board did not comprehend the precise meaning and significance of the words 'Video Taped Will,' and since the Respondent, I. Harry Lyon, only learned of the meaning and significance of these words just approximately a year before the publication of the advertisement of February 19, 1981, it is obvious that a member of the public would have no idea what he was asked to purchase for a price of $250.00." (Appellee's brief, p. 18)

The fact that Lyon had learned about video taped wills only a year prior to the advertisement is not enough to create a preponderance of the evidence that a video taped will is not a routine legal service. For that reason, and the reasons discussed in regard to Charge I, the Board's finding that Lyon and Blalock were guilty of Charge II is also due to be reversed.

III

In addition to the requirement that only routine legal services may be advertised, DR 2-102(A)(7)(b) requires that a reasonably accurate estimate of court costs be included in an attorney's advertisement. Charge III dealt with that aspect of the rule. Lyon and Blalock admitted that they did not strictly comply with this rule; however, they included in each advertisement the following statement: "(ABOVE FEES DO NOT INCLUDE COURT COSTS)." The attorneys stated at the hearing that they anticipated that the legislature might increase the court costs and, therefore, they did not include any specific cost estimates. The Bar argues that the attorneys could have included a reasonable estimate and that their uncertainty about the costs did not excuse them from compliance with the rule.

Our analysis of the Board's finding that the attorneys were guilty of Charge III is a different one from the analysis of Charges I and II. In the preceding discussion of those charges, we were concerned with whether the

Bar proved that Lyon and Blalock violated the rules as charged. Because we held that the Bar had not met its burden of proving that those rules were violated, we did not reach the issue of the constitutionality of those rules. In regard to Charge III, the attorneys admit that they did not comply with the requirement of DR 2-102 (A)(7)(b) to include an estimate of court costs. The question, then, is not whether the rule was violated, but whether the requirement to include an estimate of court costs is a constitutional restriction on attorney advertising.

To answer that question, we turn to the test which was formulated in Central Hudson Gas v. Public Service Commission of New York, 447 U.S. 557, 566 (1980) (quoted in In the Matter of R.M.J., 455 U.S. at 203-04:

> "In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within the provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental

> interest asserted, and whether it is not more extensive than is necessary to serve that interest."

Lyon and Blalock included in their advertisement a statement that the costs for the services advertised did not include court costs. An inclusion of specific costs would have made the advertisement more informative to some, but that, in and of itself, is not enough to cause the advertisement to be misleading. Anyone reading the advertisement would have been aware that the prices did not include court costs and would have taken steps to determine what those costs were.

Furthermore, the Bar has not identified any substantial interest in having a list of specific court costs included in an advertisement rather than a statement such as the one used by Lyon and Blalock in their advertisement. Central Hudson Gas, supra. Therefore, this restriction upon Lyon and Blalock's First Amendment rights cannot be sustained under the facts of this case. The Board's finding of guilty under Charge III is due to be reversed.

IV

Charge V deals with DR 2-102(A)(7)(f) which required the following disclaimer: "No representation is made about the quality of legal services to be performed or the expertise of the lawyer performing such services." The attorneys admit that they failed to include this disclaimer in their advertisement. Therefore, as in the preceding discussion of Charge III, the issue is not whether the Bar proved that the rule was violated, but whether the rule is consitutional. This Court previously addressed that issue in Mezrano v. Alabama State Bar, 434 So. 2d 732 (Ala. 1983), and upheld the disclaimer req rement as a constitutional restriction on commercial speech.

In Mezrano, we stated that the Bar could reasonably conclude that attorneys should not hold themselves out as being superior to other attorneys, because the Bar has no rating system for attorneys. 434 So. 2d at 735. Additionally, we found that attorneys' representations about the quality of their legal service could mislead the public, because the Bar does

not identify attorneys as specialists. Id. Implicit in our holding in Mezrano is that any type of price advertising by attorneys involves inherent questions of quality. This premise was recognized by Justice Powell in Bates:

> "[T]he Court notes that it has not addressed 'the peculiar problems associated with advertising claims relating to the quality of legal services.' [433 U.S. at 366] There are inherent questions of quality in almost any type of price advertising by lawyers, and I do not view appellants' advertisement as entirely free from quality implications." 433 U.S. at 400 (Powell , J., concurring in part and dissenting in part).

Furthermore, it is reasonable to assume that that some readers of an advertisement, such as the one presently before us, might believe that the attorney is a specialist or has greater expertise in performing the services advertised than attorneys who do not advertise. Accordingly, we upheld the disclaimer requirement in Mezrano because of the Bar's substantial

interest in preventing the public from being misled. This restriction meets the requirements of Central Hudson Gas and R.M.J. because the disclaimer is directly related to that interest, and it is not more extensive than necessary to serve that interest. Therefore, the Board's finding that Lyon and Blalock were guilty of Charge V is due to be affirmed.

Based upon our preceding discussion of the issues presented in this case, the Board's findings that Lyon and Blalock were guilty of Charges I, II, and III, are due to be, and they hereby are reversed, and the case is remanded as to Charges I, II, and III for further proceedings consisitent with this opinion. The finding that the attorneys were guilty of Charge V is due to be, and it is hereby, affirmed.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

All the Justices concur, except Maddox, J., who recuses himself.

IN THE MATTER OF I. HARRY LYON AND
MICHAEL D. BLALOCK
ATTORNEYS AT LAW

BEFORE THE DISCIPLINARY BOARD
OF THE ALABAMA STATE BAR

Comes now the respondents Harry Lyon and Michael Blalock in the above styled matter and as Answer to the Complaint previously filed on April 1, 1981, by the General Counsel of the Alabama State Bar would show the honorable members of the Disciplinary Board the following, to-wit:

Respondents admit the allegations contained in paragraphs one and two of Charge I of the Complaint except that Petitioner's Complaint served on Respondents did not have an Exhibit "A" attached thereto as alleged by Petitioner;

Respondents deny the averments contained in paragraphs three and four of charge I of the Complaint;

Respondents deny the averments contained in paragraphs two and three of Charge II of the Complaint;

Respondents deny the averments contained in paragraphs two and three of charge III of the Complaint;

Respondents deny the averments contained in paragraphs two and three of charge IV of the Complaint;

Respondents deny the averments contained in paragraph two and three of Charge V of the Complaint and more particularly would show as affirmative defenses to this charge the following, to-wit:

A. That DR 2-102(A)(7)(c) states "No representation shall be made in any advertisement about the quality of legal services to be performed or the expertise of any lawyer or firm of lawyers to perform such services."

That respondents in their ad did not make any representation as to the quality of services or expertise.

That respondents contend that having complied with DR 2-102(A)(7)(c), that DR 2-102 (A)(7)(f) does not apply.

B. That DR 2-102(A)(7) (the disclaimer/ exculpatory clause) is a clear and flagrant con-

tradiction to DR 6-102 Limiting Liability to Client which states "A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice" therefore to include the disclaimer/exculpatory clause as recited in DR 2-102(A)(7)(f) is to violate DR 6-102.

That Respondents contend that Petitioner's Complaint is without merit in that Respondents have complied with and rely on the landmark decision of the United States Supreme Court in the case of Bates v. Arizona State Bar Ass'n, 43 U.S. 350 (1977) and the First Amendment to the United States Constitution.

That if Respondents are found to have violated any disciplinary rule related to advertising as set forth in Petitioner's Complaint, that said rule is unreasonable and therefore void ab initio (See Bates v. Arizona, 43 U.S. 350 (1977).

Respectfully submitted,

_____

I. HARRY LYON
Respondent

MICHAEL BLALOCK
Respondent

CERTIFICATE OF SERVICE

We, the undersigned, certify that we have on this the 23rd day of April, 1981, served the original of our answer with the Disciplinary Board and a copy on the General Counsel of the Alabama State Bar by placing said original and copy in the United States mail, properly addressed and postage prepaid.

I. HARRY LYON

MICHAEL BLALOCK

Supreme Court, U.S.
FILED
AUG 30 1984
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO. 84-391

I. HARRY LYON; MICHAEL D. BLALOCK,

Petitioners,

v.

ALABAMA STATE BAR,

Respondent.

BRIEF OF RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

I. HARRY LYON; MICHAEL D. BLALOCK,

Petitioners,

v.

ALABAMA STATE BAR

Respondent.

BRIEF OF RESPONDENT

INTRODUCTION

The pending Petition for Writ of Certiorari presents the very narrow issue of whether or not the Supreme Court of Alabama in the case of I. Harry Lyon and Michael D. Blalock v. Alabama State Bar,

451 So. 2d 1367, (1984) Pet. for Cert. A1-13, has decided a federal question of substance in a way probably not in accord with applicable decisions of the Supreme Court of the United States. Only one Disciplinary Rule of the Code of Professional Responsibility of the the Alabama State Bar is challenged, namely, Disciplinary Rule 2-102(A)(7)(f) which requires attorney advertising to include a warning or disclaimer so as to assure that the consumer is not misled. The Supreme Court of Alabama in arriving at the conclusion that Disciplinary Rule 2-102(A)(7)(f) is constitutionally valid relied upon certain express language contained in Bates et. al. v. State Bar of Arizona, 433 U.S. 350 (1977), Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980) and In Re R.M.J., 455 U.S. 191 (1982). The Petitioners have demonstrated no special and important rea-

sons for granting the writ of certiorari and the same should be denied.

QUESTION PRESENTED FOR REVIEW

Disciplinary Rule 2-102(A)(7)(f), Code of Professional Responsibility of the Alabama State Bar, which does not restrict the content, time, place or manner of attorney advertising, but merely follows the mandate, directive or suggestion of the Supreme Court of the United States by requiring a warning or disclaimer so as to assure that the consumer is not misled, does not abridge freedom of speech or of the press in violation of the First Amendment, made applicable to the States through the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

(1) First Amendment, Constitution of the United States, Fourteenth Amendment, Con-

stitution of the United States. (Petition for Writ of Certiorari, pp. 2-3)

(2) Rule 19, Rules of the Supreme Court of the United States, in pertinent part provides:

> "A review on writ of certiorari is not a matter of right, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
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> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."
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> * * *

(3) Disciplinary Rule 2-102(A)(7)(f), Code of Professional Responsibility of the Alabama State Bar, provided:

> "No advertisement shall be published unless it contains, in legible print, the following language:

> 'No representation is made about the quality of legal services to be performed or the expertise of the lawyer performing such services.'"

(On January 26, 1983, there was an amendment to this Rule which is immaterial to these proceedings.)

STATEMENT OF THE CASE

The Respondent will not again outline the steps which culminated in the decision and opinion of the Supreme Court of Alabama rendered on May 11, 1984. The opinion describes the history of the case accurately. (Petition for Writ of Certiorari, A1-13)

ARGUMENT

REASONS FOR DENYING THE WRIT

Of course, the seminal case in the area of attorney advertising is Bates et al.

v. State Bar of Arizona, supra. This Court held that a blanket ban on all attorney advertising of prices for certain routine services was unconstitutional. However, this Court was careful to observe that it is the bar's role to assure that the populace is sufficiently informed as to enable it to place attorney advertising in its proper perspective. In the majority opinion this Court observed:

* * *

> "Although, of course, the bar retains the power to correct omissions that have the effect of presenting an inaccurate picture, the preferred remedy is more disclosure, rather than less. If the naivete of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective." (emphasis added) 433 U.S. at 375

* * *

This Court was careful to describe some of the clearly permissible limitations on advertising not foreclosed by the Court's holding. In the opinion the Court stated:

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> "In holding that advertising by attorneys may not be subject to blanket suppression, and that the advertisement at issue is protected, we, of course, do not hold that advertising by attorneys may not be regulated in any way. We mention some of the clearly permissible limitations on advertising not foreclosed by our holding. (emphasis added) 433 U.S. at 383
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> ...because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising. For example, advertising claims as to the quality of services - a matter we do not address today - are not susceptible of measure-

ment or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction.

* * *

We do not foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not misled. In sum, we recognize that many of the problems in defining the boundary between deceptive and nondeceptive advertising remain to be resolved, and we expect that the bar will have a special role to play, in assuring that advertising by attorneys flows both freely and cleanly." (emphasis added) 433 U.S. at 383-384

Justice Powell, concurring in part and dissenting in part, observed:

* * *

"...the Court notes that it has not addressed 'the peculiar problems associated with advertising claims re-

> lating to the quality of legal services.' Ante, at 366. There are inherent questions of quality in almost any type of price advertising by lawyers, and I do not view appellants' advertisement as entirely free from quality implications. (emphasis in original) 433 U.S. at 400
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> ...the Court's opinion does not 'foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not misled.' Ante, at 384. I view this as at least some recognition of the petential for deception inherent in fixed-price advertising of specific legal services." 433 U.S. at 402
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> * * *

It is significant that the Supreme Court of Alabama in upholding the constitutionality of Disciplinary Rule 2-102(A)(7)(f) applied the four-part analysis as

enunciated by the Supreme Court of the United States in Central Gas & Electric Corp. v. Public Service Commission of New York, supra. At page 1372, 451 So. 2d the Supreme Court of Alabama quotes from Central Hudson Gas & Electric Corp. v. Public Service Commission of New York as follows:

> "In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." Pet. for Cert. A 11

The Court in Central Hudson Gas & Electric Corp. v. Public Service Commission

of New York, supra, makes specific reference to Bates et al. v. State Bar of Arizona, supra, observing:

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> "...there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it.
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> ...in Bates the Court explicitly did not 'foreclose the possibility that some limited supplementation, by way, of warning or disclaimer or the like, might be required' in promotional materials." 447 U.S. at 565
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> * * *

In the case of In Re R.M.J., supra, the Court considered the validity of a disclaimer similar to that required by Disciplinary Rule 1-102(A)(7)(f), Code of Professional

Responsibility of the Alabama State Bar. A Rule of the Supreme Court of Missouri provided that an attorney could advertise in certain areas or fields of law but provided:

> "If one or more of these specific areas of practice are used in any advertisement, the following statement must be included ...:
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> 'Listing of the above areas of practice does not indicate any certification of expertise therein.'" 455 U.S. at 195-196 note 6

* * *

The attorney involved in the case of In Re R.M.J., supra, was charged with violating several of the Disciplinary Rules of the Supreme Court of Missouri relating to advertising. The attorney challenged the constitutionality of these Rules, but did not contend that the Rule requiring the disclaimer was unconstitutional. Neverthe-

less, the Court discussed the validity of such a disclaimer requirement as follows:

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> "...the decision in Bates nevertheless was a narrow one. The Court emphasized that advertising by lawyers still could be regulated. 455 U.S. at 200
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> Even as to price advertising, the Court suggested that some regulation would be permissible. For example, the bar may 'define the services that must be included in an advertised package ...' 433 U.S. at 373, n. 28, and the bar could require disclaimers or explanations to avoid false hopes, id., at 384. ('[S]ome limited supplementation, by way of warning or disclaimer or the like, might be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not misled'). 455 U.S. at 200 note 11
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> ...the Court noted that a warning or disclaimer might

be appropriately required, even in the context of advertising as to price, in order to dissipate the possibility of consumer confusion or deception.' [T]he bar retains the power to correct omissions that have the effect of presenting an inaccurate picture, [although] the preferred remedy is more disclosure, rather than less.' (emphasis added) 455 U.S. at 201

* * *

In short, although the Court in Bates was not persuaded that price advertising for 'routine' services was necessarily or inherently misleading, and although the Court was not receptive to other justifications for restricting such advertising, it did not by any means foreclose restrictions on potentially or demonstrably misleading advertising. Indeed, the Court recognized the special possibilities for deception presented by advertising for professional services. The public's comparative lack of knowledge, the limited ability of the professions to police themselves, and the absence of any standardization in the

> 'product' renders advertising for professional services especially susceptible to abuses that the States have a legitimate interest in controlling.
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> ...the States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive. Thus, the Court in Bates suggested that the remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation. 455 U.S. at 203
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> * * *
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> Appellant makes no challenge to the constitutionality of the disclaimer requirement, and we pass on to the remaining three infractions." 455 U.S. at 204

The Supreme Court of Alabama considered a challenge to the constitutionality

of Disciplinary Rule 2-102(A)(7)(f), Code of Professional Responsibility of the Alabama State Bar, in the case of Mezrano v. Alabama State Bar, 434 So. 2d 732 (Ala. 1983) (As hereinabove noted, an amendment was added to the Rule January 26, 1983, which is immaterial insofar as these proceedings are concerned).Relying upon statements contained in the opinions in Bates et al. v. State Bar of Arizona, supra, and In Re R.M.J., supra, the Supreme Court of Alabama concluded that the Rule is constitutional,observing:

* * *

> "The Alabama Bar Association has no rating system. Applicants for bar admission in this state do not receive their scores on the bar examination if they pass. The Alabama Bar does not identify attorneys as specialists. Therefore, we feel that attorney's representations about the quality of their legal services could very well mislead the public. Upon passing the bar examina-

> tion, all attorneys are presumed to be on an equal footing. Thus, the Alabama State Bar could reasonably conclude that attorneys should not hold themselves out as being superior to other attorneys when there is no rating system in this state." 434 So. 2d at 735
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> * * *

Carefully applying the test described in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, supra, the Supreme Court of Alabama in the instant case upheld the validity of Disciplinary Rule 2-102(A)(7)(f), Code of Professional Responsibility of the Alabama State Bar, concluding:

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> "Implicit in our holding in Mezrano is that any type of price advertising by attorneys involves inherent questions of quality.
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> Furthermore, it is reasonable to assume that

> some readers of an advertisement, such as the one presently before us, might believe that the attorney is a specialist or has greater expertise in performing the services advertised than attorneys who do not advertise. Accordingly, we upheld the disclaimer requirement in Mezrano because of the Bar's substantial interest in preventing the public from being misled. This restriction meets the requirements of Central Hudson Gas and R.M.J. because the disclaimer is directly related to that interest, and it is not more extensive than necessary to serve that interest." 451 So. 2d at 1373, Pet. for Cert. A 12

* * *

CONCLUSION

The Supreme Court of Alabama has carefully followed the precedents and guidelines set by the Supreme Court of the United States and the writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Respondent has been served upon I. Harry Lyon and Michael D. Blalock, 2900 Linden Avenue, Birmingham, Alabama, 35209, by United States mail, postage prepaid, this 30th day of August, 1984.

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